1957

Loa Johnson v. Elizabeth F. Syme : Brief of Respondent

Utah Supreme Court

In the Supreme Court
of the State of Utah

LOA JOHNSON,
Plaintiff and Appellant,
vs.
ELIZABETH F. SYME,
Administratrix of the Estate of Bailey Syme, Deceased,
Defendant and Respondent.

No. 8547

RESPONDENT'S BRIEF

RAY, QUINNEY & NEBEKER
Attorneys for Respondent.

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STATEMENT OF FACTS

The respondent generally incorporates herein the statement of facts set forth in appellants' brief as reflecting the record in this proceeding. May we, however, reiterate certain portions thereof in addition to certain parts of the record to afford a clear understanding of the respondent's position and the basis of the holding of Judge A. H. Ellett in the lower court.

For reference purposes, the record herein will be cited as follows: (BR) as indicating the appellant's brief; (D) as indicating the deposition of the appellant; and (T) as indicating the transcript.

Initially, the appellant frequently traveled and was familiar with the portion of U.S. 91 where this intersection is situated and where the mishap occurred. (D-10). Some 600 feet directly south of the "T" intersection, a sign indicated to northbound traffic that a roadway leading east to the City of Draper was directly ahead. (BR-2). The appellant was proceeding north at a speed of from 50 to 55 miles per hour where the speed limit was 50 miles per hour. (BR-2). It was then night, but visibility was good. (BR-5). The road surface was wet, but not puddled, and the surrounding terrain was of open farm lands without any concealing growth or improvements which would obstruct or interfere with the vision or observation of drivers proceeding north, as was the appellant. (BR-4-5) Both of the vehicles involved in this accident had the headlights on at the time of the accident (T-18)

The appellant stated in her deposition that she first observed the deceased's automobile when it was "straight" in front of her and when deceased's automobile was at a distance from her of only "between twenty or thirty feet" and proceeding west across appellant's lane of traffic. (D-13-17) Appellant stated, when asked the speed at which deceased was proceeding

> "A. He wasn't going very fast. He was just barely moving, if not standing still, practically. He looked to me, when I first seen him, like he was almost parked, but he must have been moving a little." (D-14)

and she thereafter made a *guess* as the deceased's speed of "ten or twenty miles an hour, probably." (D-14)

The appellant's automobile collided and came into contact with deceased's car somewhere in the area of the right door, (D-14) and at a point on the pavement close to the west shoulder of the northbound traffic lanes of U.S. 91 (D-14).

No issue is, by this proceeding, before the court as to the deceased's negligence.

From appellant's proposed proof, the physical evidence would establish that the decedant traveled west from the said stop sign 30 feet before arriving at the easterly edge of the pavement of U.S. 91, across the 24 foot easterly lane of North bound traffic and across the 16 foot westerly lane of north bound traffic and his front wheels had gone west of the westerly edge of the pavement at the time of impact—a total distance in excess of 70 feet—at a speed that was "barely moving." (BR-1-2)

This movement of the deceased was clearly discernible by witnesses who were proceeding under the same circumstances and conditions as the appellant, but who were behind her "a block" and who had, therefore, a proportionate disadvantage of observation. (B-5) In fact, one of the witnesses appellant proposed to call and who was following appellant "a block" would have testified, according to appellant, that he observed the movement of the deceased from a point 300 feet east of the stop sign right up to the time of impact (BR-4)

The foregoing evidence adduced by the published deposition of the appellant, stipulations of counsel and certain informal proffers made by counsel, which are not

here controverted, formed the fact basis for Judge [illegible]-lett's ruling that as a matter of law no facts were pre-sented which would support the counter claim of the respondent and that the appellant was guilty of con[illegible]butory negligence as a matter of law. Appeal was tak[illegible]n by the plaintiff on the issue of contributory negligen[illegible]e and therefater the defendant cross appealed from the ruling on her counter claim.

STATEMENT OF POINTS RELIED UPON

POINT NO. I.

THE CONDUCT OF THE APPELLANT CONSTITUTED NEGLIGENCE AS A MATTER OF LAW.

POINT NO. II.

THE CONDUCT OF THE APPELLANT PROXIMATELY CAUSED OR CONTRIBUTED TO HER INJURIES AS A MATTER OF LAW.

POINT NO. III.

AS A MATTER OF LAW, THE DECEASED COULD NOT BE CHARGED WITH WILFUL OR WANTON MISCONDUCT.

ARGUMENT

POINT NO. I.

THE CONDUCT OF THE APPELLANT CONSTITUTED NEGLIGENCE AS A MATTER OF LAW.

As recited in the statement of facts, the intersection with which we are here concerned is a "T" inter-

section on a divided highway. The Draper road intersects only the northbound traffic on U.S. 91 which, in turn, is separated from southbound traffic by an island [illegible] feet in width. This physical condition is such that a driver proceeding north as appellant, has to concern himself only and exclusively with traffic moving in the same direction or with vehicles entering the highway in front of him at the intersection. The terrain is flat, the highway is perfectly straight and there are no obstruction of any nature which would prevent northbound drivers from observing the movement of other vehicles approaching, or at the intersection.

Under these physical circumstances, the uncontroverted evidence is that the appellant was northbound on U.S. 91 in the westerly lane, traveling between 50 and 55 at about 11:00 P.M. and completely failed to observe the deceased's automobile or its headlights until it was "straight ahead" of appellant and "barely moving." This, even though the deceased's automobile had its headlights on and had proceeded at least 70 feet past the stop sign and in front of appellant. Appellant has admitted that she was looking ahead prior to the collision, and, as stated in *Smith v. Bennett*, 1 *Utah* 2*d* 224, 265 *P.* 2*d* 401, 404,

> ". . . there was but one demand upon plaintiff's attention. There is no room for a reasonable difference of opinion as to where her attention should have been concentrated; . . . that she failed to use due care in doing so is manifest from the evidence."

The lower court has rightly concluded that this admitted complete failure of the appellant to observe de-

ceased's automobile under obvious circumstances, constituted negligence as a matter of law.

> "A motorist must use his eyes and see seasonably that which is open and apparent. In other words, the duty of looking ahead imposes upon the driver, whether of an automobile or of domestic animals, the obligation to see whatever there may be in the line of his vision, for a reasonable distance, which will affect his driving, and, if his view is unobstructed, he will be held in law to have seen (vehicles) on the street in front of him, and will be deemed negligent as a matter of law if he fails to see that which should have been obvious." 1 *Blashfield Cyclopedia of Automobile Law and Practic Section Section* 682.

One patent error in the appellant's position here arises by reason of her proposed proof. Counsel significantly fails to comment on appellant's failure to keep a proper lookout and yet proposed at pre-trial to rely on the testimony of witnesses following "a block" behind appellant to establish the negligence of the deceased. In other words, appellant is silent in her brief on the fact that she looked but didn't see the perfectly obvious, even in the face of the fact that the very witnesses she intended to rely upon to establish her case, distinctly observed from a position a block behind appellant all of the movements made by deceased's vehicle from a point 300 feet east of the stop sign up to the point of impact. This, we feel, is a real dilemma for appellant and properly and completely establishes either that she was not looking immediately prior to the accident, or that she was looking and failed to observe the obvious. Either of which events establish that the appellant was guilty of contributory negligence as a matter of law.

Appellant cites authority in her brief which allegedly establishes that the issue of contributory negligence should *in every* instance be submitted to the jury. This, of course, is not the rule. (See *Hicks v. Skinner,* 113 *Utah* 1, 190 *Pac.* (2d) 514. *Mingus v. Olson,* 114 *Utah* 505, 201 *Pac.* (2d) 495, *and Covington v. Carpenter,* 4 *Utah* (2d) 378, 294 *Pac.* (2d) 788).

It seems well established by the foregoing authority and well settled in Utah that a motion for a directed verdict will properly be granted if two fact elements are present in a given case as a matter of law:

(1) That the plaintiff is negligent, and

(2) That such negligence proximately contributed to cause his or her own injury. (See also *Martin v. Stevens, (Utah),* 243 *Pac.* (2d) 747.

In the case now before the court, there exists no necessity to labor questions of human judgment. If three occupants of motor vehicles following appellant "a block" were able to clearly observe the movement of deceased's vehicle for a distance of some 370 feet up to the point of impact and the appellant, on the other hand, did not see deceased's vehicle at night, with lights burning, until it was directly in front of her "barely moving" at a distance of only "20 to 30 feet" then she was contributorily negligent as a matter of law. The first element of "negligence" to sustain a directed verdict is obviously present, as found by Judge Ellett.

POINT NO. II

THE CONDUCT OF THE APPELLANT PROXIMATELY CAUSED OR CONTRIBUTED TO HER INJURIES AS A MATTER OF LAW.

Appellant was fully familiar with that portion of U.S. 91 where the accident occurred, having driven the same portion thereof weekly for some period of time. In addition, the presence of the Draper road was constantly brought to the attention of northbound traffic by reason of an appropriate sign on the highway. With this knowledge in appellant, she negligently failed to observe the deceased's vehicle proceed some 70 odd feet past the stop sign and directly in front of her at a speed which, she stated, was "barely moving," until it was within "20 or 30 feet."

If we give this "barely moving" a speed even as high as 10 miles per hour it is elementary that the appellant would travel a distance at 50 miles per hour equal to five times that which the deceased covered. In other words, *after* it was evident that deceased had passed the stop sign, deceased traveled at least 70 feet while at the same time appellant traveled five times as far or at least 350 feet. If we take her speed at 55 miles per hour, she would have traveled at least 385 feet. In this distance, and after deceased had proceeded past the stop sign, appellant could have come to a complete stop in approximately 184 feet and had 166 feet left to the point of impact, or she could have proceeded within an additional 166 feet, nearly half way to the point of impact, and still been able to come to a complete stop prior to the point of impact. Further, during this 350 feet, the ap-

pellant could reasonably have reduced her speed commensurate with the situation then confronting her or she could reasonably have turned her car to the other northbound lane of traffic.

Of course, none of these precautionary measures were taken, because the appellant was negligent in failing to observe the deceased's headlights or his vehicle until it was directly in front of her, "barely moving" and at a distance of only "twenty or thirty feet." Under these irrefutable admissions of the appellant, her negligence, as a matter of law, must be deemed to have proximately contributed to this accident and contributed to the injuries of which she complains.

As generally stated in the Utah cases and reiterated by the text writers,

> ". . . the rule in automobile accident cases . . . is that any negligence of one, seeking redress for injuries to his person or property through the wrong of another contributing directly or proximately to such injury, to such an extent that but for it he would not have been injured, will defeat a cause of action founded on the primary negligence of the defendant, brought by the plaintiff . . ." (See 4 *Brashfield Cyclopedia of Automobile Law and Practice Section* 2761.)

We respectfully submit that the failure of the appellant to observe the vehicle of the deceased for some 320 odd feet did, as a matter of law, proximately cause or contribute to the accident and the injuries about which appellant complains.

POINT NO. III.

AS A MATTER OF LAW, THE DECEASED COULD NOT BE CHARGED WITH WILFUL OR WANTON MISCONDUCT.

Here, as on the previous two points, the appellant ignores the significance and weight of her own testimony. Initially, she *assumes* that the deceased was operating his vehicle recklessly. Her comments in this regard include an inuendo that the decedent had partaken of alcoholic beverages notwithstanding the fact that on page 15 of her brief she says: "In this case there was no evidence of intoxication on the part of (the deceased.)" Therefore, she is left with the charge that the decedent drove through a stop sign at a speed of 40 miles per hour to substantiate her allegation of wilful and wanton misconduct. The evidence as to the speed would apparently be adduced by a witness, O. F. Stanley, who was traveling about "a block" behind the appellant, and his observation, according to the brief of appellant, was made when the deceased was approximately 300 feet east of the stop sign. In direct contradiction of this testimony, appellant herself stated that the speed of the deceased when first observed was "barely moving." It seems to us, therefore, that the speed at which the deceased was traveling would, as a matter of law, be excluded from that category labeled "wilful and wanton misconduct," for

> ". . . the injury must either have been intentionally inflicted or produced by act so grossly negligent as to exhibit reckless disregard for the safety of others." (4 *Blashfield Cyclopedia of Automobile Law & Practice Section* 2771.)

Certainly, "barely moving" is not such a speed.

The next point which the appellant raises to establish the wilful and wanton misconduct of the deceased was the fact that he had proceeded through a stop sign. Assuming, arguendo, that the deceased did proceed through a stop sign without stopping, this, as a matter of fact, could not "proximately" cause the accident. It seems to go without saying that proceeding through a stop sign is not wilful and wanton misconduct, as appellant seems to think that it is, and we know of no case which would support her contention. No presumption can be made that such failure to observe constitutes wilful and wanton misconduct, and no case has been cited by the appellant which establishes the rule to be the contrary. As a matter of fact, decedents are presumed to have acted reasonably and carefully as ordinarily prudent persons in operating their vehicles on the highway. Here, of course, decedent cannot testify, but the physical facts are such, and the undisputed evidence establishes, that he had proceeded at least 70 feet past the stop sign at the time of the impact and was traveling, when observed by appellant, at a speed that was "barely moving." In addition, he had practically negotiated his vehicle *entirely* across the wide northbound lanes of U.S. 91. We must further mark well that it was the *decedent* who was struck — *not* the appellant. It was the fact that appellant failed to observe and was operating her vehicle at a speed which did not allow her to stop her vehicle within her lights that caused this unfortunate occurrence.

Under the foregoing facts, the lower court rightly held that there was no evidence which would establish

a jury issue as to whether or not the deceased had operated his vehicle in a wilful or wanton manner.

On the other hand, can be ignore the appellant's admitted failure to observe the obvious—her speed—the fact that witnesses a block behind her were fully able to make competent observations—her failure to make any attempt to avoid this collision. Surely, if wilful and wanton misconduct was a factor contributing to the injuries sustained by the appellant, appellant's own acts, as a matter of law, would properly be characterized in this category.

> "When a party wilfully or wantonly contributes, as a proximate cause to his own injury, he cannot recover, even though the defendant also acted in a wilful and wanton manner. If the parties were equally, in the same class, to blame in producing the injury, neither can recover." (*Spiller v. Griffen*, 95 S.E. 133, 109 S.C. 78, 4 *Blashfield Cyclopedia of Automobile Law and Practice Section* 2776.)

The appellant takes comfort in making an analogy to decided cases on the statutes relating to involuntary manslaughter, but cases are substantially different as to facts from the case now before this court. In addition, these cases relate to criminal violations and the rules and the construction placed upon the applicable statutes have no relation to our problem. In *State vs. Lingman*, 97 *Utah* 180, 91 *Pac. 2d* 457 the defendant was traveling at an excessive speed and the physical facts were such that the excessive speed was established as a matter of law and that such excessive speed would have substantially caused or contributed to the death of the person struck by

the defendant. And, again, in *State vs. Barker,* 113 *Utah* 514, 196 *Pac. 2d* 723 the facts were such that the defendant proceeded through a stop sign and drove directly *into* the care in which decedent was a passenger. It seems to us extremely significant that both the Lingman case and the Barker case were reversed by this court and no discussions whatever was had regarding "wilful and wanton misconduct." No precedent is set forth in either of these decisions which would in any way support the position of the appellant in this proceeding. And, when placed in proper context with the facts therein involved, the limited application of the rule set forth in these involuntary manslaughter cases is self-evident.

CONCLUSION

Based upon the foregoing argument, and the rules announced by this court, the appellant herein was contributorily negligent in the operation of her vehicle as a matter of law and the decision of the lower court should be affirmed.

Respectfully submitted,

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